



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. PD-1247-18

SIDNEY WORK, Appellant

v.

STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD COURT OF APPEALS
MILLS COUNTY**

**NEWELL, J., filed a concurring opinion in which RICHARDSON,
J., joined.**

I agree with the Court that the trial court did not abuse its discretion in admitting evidence of Appellant's prior conviction for "drug possession." As the Court explains, the trial court could have rationally concluded that Appellant's prior felony drug possession gave him an

incrementally greater motive to cover up his involvement in a subsequent felony drug-possession offense. I also agree with the Court that evidence of Appellant's prior drug arrest and knowledge of his *Miranda* rights was likely inadmissible, but the introduction of that evidence was ultimately harmless.

But I cannot join the Court's opinion regarding the admission of Appellant's statements that he had recently used drugs. The Court seems to hold that this evidence is admissible under the theory that it can establish Appellant's drug addiction and the question of whether addiction is a character trait falls within the zone of reasonable disagreement. But saying that reasonable people can disagree about whether drug addiction is a character trait fails to provide a theory of admissibility that is separate and apart from character conformity.¹ It also paves the way for the State's introduction of evidence of other psychological disorders or mental illness to prove guilt. This would seem to turn the prohibition against admission of character evidence found in Rule 404(a) on its head.

The text of Rule 404(a) reads as follows:

¹ *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990) (op. on reh'g) ("If the trial court determines the evidence has no relevance apart from character conformity, then the evidence is absolutely inadmissible. The trial court has no discretion to admit it.").

(a) Character Evidence

(1) *Prohibited Uses*. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.²

Rule 404(a) prohibits the State from introducing any character or character trait evidence unless the defendant chooses to put a particular character trait in issue.³ And while the State can admit evidence of other acts, it still cannot run afoul of the general prohibition against introducing evidence of the defendant's character or trait. The text of 404(b) states:

(b) Crimes, Wrongs, or Other Acts

(1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in Criminal Cases*. This evidence may be admissible for another purpose, such as providing motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.⁴

This does not mean that character evidence is inadmissible because it is

² TEX. R. EVID. 404(a)(1).

³ TEX. R. EVID. 404(a)(2)(A).

⁴ TEX. R. EVID. 404(b).

irrelevant; it is inadmissible notwithstanding the issue of relevance.⁵ Rule 404(a) prohibits the use of character evidence because it is generally “laden with the dangerous baggage of prejudice, distraction, time consumption and surprise.”⁶ This rule essentially follows the common law reasoning that “an accused person is entitled to be tried on the accusation made in the State’s pleading and not on some collateral crime, or for being a criminal generally.”⁷ That is why the character evidence must have relevance separate and apart from character conformity to be admissible under Rule 404(b)(2).⁸

This prohibition against admitting character evidence is consistent with the United States Supreme Court decision in *Robinson v. California*. There, the Court struck down a statute that made it a crime to be a drug addict.⁹ The Court reasoned that drug addiction is an illness that can be acquired innocently, and it violates the Eighth Amendment to punish

⁵ See *Sims v. State*, 273 S.W.3d 291, 294 (Tex. Crim. App. 2008).

⁶ 1 Steven Goode & Olin Guy Wellborn III, *Texas Practice Series: Guide to the Texas Rules of Evidence* § 404.2 (4th ed. 2016). See 1 Linda L. Addison, *Texas Practice Guide: Evidence* § 4:117 (2019) (character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion).

⁷ *Sims*, 273 S.W.3d at 295 (quoting *Young v. State*, 261 S.W.2d 836, 837 (Tex. Crim. App. 1953)).

⁸ *Montgomery*, 810 S.W.2d at 387.

⁹ *Robinson v. California*, 370 U.S. 660, 667 (1962).

someone for simply having an illness.¹⁰ As the Court noted, “Even one day in prison would be a cruel and unusual punishment for the crime of having a common cold.”¹¹

The Court responds to Appellant’s argument that the evidence at issue is character evidence by pointing to *Robinson’s* description of drug addiction as an innocent illness. However, the Court does not account for how evidence of addiction will be used under this holding. As Appellant argues, the State was allowed to use the evidence to show that Appellant might have committed a crime because he acted in conformity with his drug addiction. Putting the evidence in terms of Rule 404(a)’s prohibition against admitting character evidence, admission of other acts as evidence of “drug addiction” allows the State to prosecute Appellant for being an addict generally. Moreover, holding that a trial judge could reasonably conclude that drug addiction is not a character trait is hard to square with the Court’s determination that evidence of Appellant’s prior arrest for drug possession is inadmissible character evidence or runs afoul Rule 403.

I would treat the evidence of Appellant’s admission of prior drug use

¹⁰ *Id.*

¹¹ *Id.*

the same way the Court treats the evidence of Appellant's prior drug arrests. The evidence was inadmissible, but harmless. With these thoughts, I concur.

Filed: November 4, 2020

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